SUPREME COURT OF THE UNITED STATES.

No. 364.

HENRY F. TURTON, PLAINTIFF IN ERROR,

vs.

JOHN L. DUFIEF.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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1 THE UNITED STATES OF AMERICA, *District of Maryland, to wit:*

At a circuit court of the United States for the fourth circuit in and for the Maryland district, begun and held at the city of Baltimore, on the first Monday in November, in the year of our Lord one thousand eight hundred and sixty.

Present, the honorable William F. Giles, judge of Maryland district; William Meade Addison, esquire, attorney; Thomas Spicer, clerk.

Among other were the following, to wit:

HENRY F. TURTON
vs.
JOHN L. DUFIEF.

Be it remembered, that heretofore, to wit, on the 21st day of November, in the year of our Lord one thousand eight hundred and fifty-nine, the said Henry F. Turton, by Robert J. Brent, esquire, his attorney, prosecuted and sued forth out of the circuit court here the writ of the United States of America of subpœna, directed to the marshal of the Maryland district aforesaid, in the words and of the tenor following, to wit:

Writ.

THE UNITED STATES OF AMERICA, *District of Maryland, to wit:*

To the marshal for the Maryland district, greeting:

2 We command you that you summon John L. Dufief, late of Montgomery county, State of Maryland, that, all excuses and delay set aside, he be and appear before the circuit court of the United States for the fourth circuit in and for the Maryland district, to be held at the United States court-room, in the city of Baltimore, on the first Monday in April next, to answer unto Henry F. Turton, a citizen of the State of Missouri, in a plea of trespass upon the case, &c. Hereof you are to fail not, at your peril, and have you then and there this writ.

Witness the honorable R. B. Taney, Chief Justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and forty-eight.

Issued 21 November, 1859.

[SEAL.] THOMAS SPICER, *Clerk Cir. C't.*

R. J. B.

And the said Henry F. Turton, by his attorney aforesaid, on the day of prosecuting and suing forth of the aforesaid writ, declared against the said John L. Dufief in the plea aforesaid in form following, to wit:

Declaration.

Circuit court of the United States in and for the district of Maryland.

MARYLAND DISTRICT, *to wit:*

John L. Dufief, late of Montgomery county, in Maryland district, was attached to answer unto Henry F. Turton in a plea of trespass upon the case, &c., and whereupon the said Henry F. Turton, a citizen

of the State of Missouri, by R. J. Brent, his attorney, complains for that whereas the said John L. Dufief, a citizen of the State of Ma-
3 ryland, on the fifteenth day of July, in the year of our Lord eighteen hundred and fifty-one, at, to wit, at the district aforesaid made his said certain promissory note in writing, bearing date the day and year aforesaid, and then and there delivered the said note to the plaintiffs, and thereby then and there promised, twelve months after the date of said note, to pay unto the plaintiff two thousand dollars, with interest from the date thereof, for value received, by reason of which premises, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note; and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and faithfully promised the said plaintiff to pay him the sum of money in the said note specified so made thereon as aforesaid. And whereas the said defendant in this action, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, was indebted to the said plaintiff in this action in another large sum of money, to wit, the sum of three thousand dollars, current money, for money by the said plaintiff before that time lent and advanced to the said defendant at his special instance and request, and for other money by the said plaintiff before that time laid out and expended for the said defendant, and at his like special instance and request; and for other
4 money by the said defendant before that time had and received to and for the use of the said plaintiff; and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and faithfully promised the said plaintiff to pay him the said last-mentioned sum when the said defendant should be thereto afterwards requested.

Nevertheless the said defendant hath not yet paid the aforesaid several sums of money, or any part thereof, to the said plaintiff, although so to do the said defendant was requested by the said plaintiff afterwards, to wit, on the day and year last aforesaid, and often afterwards, to wit, at the district aforesaid, but to pay the same the said defendant hath hitherto altogether refused, and doth still refuse so to do, to the damage of the said plaintiff in the sum of four thousand dollars of like current money. And thereupon the said plaintiff brings suit, &c.

R. J. BRENT,
Attorney for the Plaintiff.

Pledges for prosecution:
JOHN DOE and RICHARD ROE.

A copy of which said declaration was made and sent with the said writ to the marshal of the Maryland district aforesaid, thereon indorsed, "Case copy nar to be left with the defendant."

At which mentioned first Monday in April, in the year of our Lord 1850, being the day of the return of the aforegoing writ, comes into

the said circuit court here, the said Henry F. Turton, by his attorney aforesaid, and the marshal of the Maryland district aforesaid, to wit, John W. Watkins, gentleman, to whom the said aforegoing
5 writ was in form aforesaid directed, makes return thereof to the court here, thus indorsed, to wit:

"Cepi; 63 miles.

"JOHN W. WATKINS, *U. S. Marshal.*"

And the said John L. Dufief, being called, appears in court here, by Henry Winter Davis, James R. Partridge, and J. Dean Smith, his attorneys.

And thereupon, on motion of the said Henry F. Turton, by his attorney aforesaid, it is ruled by the court here, that the said John L. Dufief answer to the declaration aforesaid of the said Henry F. Turton in the plea aforesaid, or judgment by the court here will be entered against him in default thereof.

And the said John L. Dufief, by his attorneys aforesaid, defends the force and injury when, and so forth, and files in the circuit court here, the following pleas, to wit:

Pleas.

In the circuit court of the United States for the district of Maryland, April term, 1860.

JOHN L. DUFIEF, *at the suit of* HENRY F. TURTON.

And the said John L. Dufief, the defendant in this action, by H. Winter Davis, Jas. Partridge, and J. Dean Smith, his attorneys, comes and defends the wrong and injury when, &c., and says that he did not undertake or promise in manner and form as the said Henry F. Turton has above thereof complained against him; and of this he puts himself upon the country, &c.

And for further plea in this behalf, the said defendant, by
6 leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that he did not at any time within three years next before the commencement of this suit undertake or promise in manner and form as the said plaintiff has above thereof complained against him, and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

And for further plea in this behalf, the said defendant, by leave of the court here first had and obtained, according to the form and statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said several supposed causes of action in the said declaration mentioned, did not, nor did any or either of them accrue to the said plaintiff at any time within three years next

before the commencement of this suit, in manner and form as the said plaintiff has above thereof complained against him, and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

H. WINTER DAVIS.
JAMES R. PARTRIDGE,
J. DEAN SMITH,
Pl'ff's Att'ys.

7 And the said Henry F. Turton, by his attorney aforesaid, says, as to the said plea of the said John L. Dufief by him first above pleaded, whereof he hath put himself upon the country, the said Henry F. Turton doth the like, &c.

And as to the said plea of the said John L. Dufief by him secondly above pleaded, the said Henry F. Turton says that he, by reason of anything in that plea above alleged, ought not to be precluded from having or maintaining his said action against him, the said John L. Dufief; because he says that the said John L. Dufief did, within three years next before the impetration of the original writ of him the said Henry F. Turton in this cause, undertake and promise, in manner and form as the said Henry F. Turton hath above thereof complained against him, and this he prays may be inquired of by the country; and the said John L. Dufief doth likewise.

And as to the said plea of the said John L. Dufief lastly above pleaded, the said Henry F. Turton says that he, by reason of anything in that plea above alleged, ought not to be barred from having and maintaining his action thereof against the said John L. Dufief, because he says that the said John L. Dufief, within three years next before the day of the impetration of the original writ of him the said Henry F. Turton, did assume upon himself, in manner and form as the said Henry F. Turton above against him complains, and this he prays may be inquired of by the country, &c. And the

8 said John L. Dufief in like manner, &c.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of said parties and their attorneys aforesaid, and by order of the court here, is continued until the first Monday in November next.

At which said first Monday in November, in the year of our Lord 1860, comes again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

And the said Henry F. Turton, by his attorney aforesaid, prays leave of the court here, according to the form of the statute in such case made and provided, to amend his declaration aforesaid, and to declares anew against the said John L. Dufief in the plea aforesaid, and it is granted him.

Thereupon the said Henry F. Turton, by his attorney aforesaid, declares anew against the said John L. Dufief in the plea aforesaid, in manner and form and of the tenor following, to wit:

Amended declaration.

Circuit court of the United States for the district of Maryland.

MARYLAND DISTRICT, *to wit:*

John L. Dufief, late of Montgomery county, in Maryland district, a citizen of the State of Maryland, was attached to answer unto Henry F. Turton, a citizen of the State of Missouri, in a plea of trespass upon the case, &c., and whereupon the said Henry F. Turton, a citizen of the State of Missouri, by R. J. Brent, his attorney,
9 complains for that whereas a certain Ephraim Wheeler, on the twelfth day of July, in the year of our Lord eighteen hundred and fifty-one, at Washington, to wit, at the district aforesaid, by the name of E. Wheeler, made his certain promissory note in writing, bearing date the day and year aforesaid, and then and there delivered the said note to the said John L. Dufief, the defendant, a citizen of the State of Maryland, and thereby then and there promised, twelve months after the date of the said note, to pay unto the order of the said John L. Dufief two thousand dollars for value received; and the said John L. Dufief, to whom or to whose order the payment of the said sum of money in the said note specified was to be made, after the making and maturity of the said note, and before the bringing of this suit, to wit, on the 18th day of November, in the year of our Lord eighteen hundred and fifty-seven, at the district aforesaid, indorsed the said note, by which said indorsement the said John L. Dufief then and there appointed the said sum of money in the said note specified to be paid to the said plaintiff, and then and there delivered the said note so indorsed to the said plaintiff.

And the said plaintiff in fact saith that afterwards, to wit, on the 18th day of November, in the year eighteen hundred and fifty-seven, at the district aforesaid, the said note, so indorsed as aforesaid, was presented and shown to the said Wheeler for the payment thereof, and he was then and there requested to pay the said sum of money
10 in the said note specified, according to the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid; but the said Wheeler did not, nor would at the time when the said note was presented and shown to him for payment thereof as aforesaid, nor at any time afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do. Of all which premises the said defendant afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, had notice; by reason of which premises, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and of the said indorsement so made thereon as aforesaid; and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, undertook and faithfully promised the plaintiff to pay him the sum of money in the said note specified, according to the tenor and effect of

the said note and of the said indorsement so made thereon as aforesaid:

And whereas heretofore, to wit, on the day and year aforesaid, at the district aforesaid, the said defendant, then and there having for the use of a certain M. R. Fowler (who hath since intermarried with the plaintiff) the sum of two thousand dollars, in consideration that the said M. R. Fowler would consent and agree that he, the said defendant, should loan the said sum of money to some person,
11 on good and sufficient security for the repayment thereof, and in consideration of the authority given by said M. A. Fowler to the said defendant in that behalf, at his special instance and request, he, the said defendant, then and there undertook and faithfully promised the said M. A. Fowler that he would diligently and carefully loan the said money to some person, on good and sufficient security for the repayment thereof; and the said M. A. Fowler confided in said undertaking of the defendant—did agree that the said defendant should loan said money as aforesaid; yet the said defendant, contriving and fraudulently intending to deceive and defraud the said M. A. Fowler, did not perform or regard his said last mentioned promise and undertaking, but craftily and subtelly deceived and defrauded the said M. A. Fowler, in this, to wit, that the said defendant did not diligently and carefully loan and invest the said sum of money to some person on good and sufficient security for the repayment thereof, but, on the contrary thereof, on the day and year last aforesaid, loaned the same to a certain Ephraim Wheeler, and did not take good and sufficient security from him for the repayment of said sum of money; whereby the said sum of money so loaned as aforesaid hath been wholly lost to the said M. A. Fowler, now the wife of the said plaintiff:

And whereas the said John L. Dufief, the defendant in this action, afterwards, to wit, on the day and year last aforesaid, at the
12 district aforesaid, was indebted to the said plaintiff in this action in another large sum of money, to wit, the sum of two thousand dollars current money, for money by the said plaintiff before that time lent and advanced to the said defendant, at his special instance and request; and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at his like special instance and request; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and faithfully promised the said plaintiff to pay him the said last-mentioned sum of money, when the said defendant should be thereto afterwards requested.

Nevertheless the defendant hath not yet paid the aforesaid several sums of money, or any part thereof, to the said plaintiff, (although so to do the said defendant was requested by the said plaintiff afterwards, to wit, on the day and year last aforesaid, and often afterwards, to wit, at the district aforesaid;) but to pay the same the said defendant hath hitherto altogether refused, and doth still refuse

so to do, to the damage of the said plaintiff in the sum of three thousand dollars of like current money. And thereupon the said plaintiff brings suit, &c.

R. J. BRENT,
Attorney for the Plaintiff.

Pledges for prosecution:
JOHN DOE and RICHARD ROE.

13 And the said John L. Dufief, by his attorney aforesaid, defends the force and injury, when, and so forth, and files in the circuit court his pleas to the amended declaration of the said Henry F. Turton in the plea aforesaid, in form following, to wit:

In the circuit court of the United States for the district of Maryland, April term, 1860.

JOHN L. DUFIEF, *at the suit of* HENRY F. TURTON.

And the said John L. Dufief, the defendant in this action, by H. Winter Davis, Jas. Partridge, and J. Dean Smith, his attorneys, comes and defends the wrong and injury when, &c., and says that he did not undertake or promise in manner and form as the said Henry F. Turton has above thereof complained against him, and of this he puts himself upon the country, &c.

And for further plea in this behalf, the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statutes in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that he did not, at any time within three years before the commencement of the suit, undertake or promise in manner or form as the said plaintiff has above thereof complained against him, and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

14 And for further plea in this behalf, the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statutes in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said several supposed causes of action in the said declaration mentioned did not, nor did any or either of them, accrue to the said plaintiff at any time within three years next before the commencement of this suit, in manner and form as the said plaintiff has above thereof complained against him, and this he is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

H. WINTER DAVIS.
JAMES R. PARTRIDGE,
J. DEAN SMITH,
Pl'ff's Att'y.

And the said Henry F. Turton, by his attorney aforesaid, says as to the said plea of the said John L. Dufief by him first above pleaded, whereof he hath put himself upon the country, the said Henry F. Turton doth the like, &c.

And as to the said plea of the said John L. Dufief by him secondly above pleaded, the said Henry F. Turton says that he, by reason of anything in that plea above alleged, ought not to be precluded from having or maintaining his said action against him, the said John L. Dufief, because he says that the said John L. Dufief did, within three years next before the impetration of the original writ of him,
15 the said Henry F. Turton, in this cause, undertake and promise in manner and form as the said Henry F. Turton hath above thereof complained against him, and this he prays may be inquired of by the country, and the said John L. Dufief doth likewise.

And as to the said plea of the said John L. Dufief, by him lastly above pleaded, the said Henry F. Turton says that he, by reason of anything in that above plea alleged, ought not to be barred from having and maintaining his action thereof against the said John L. Dufief, because he says that the said John L. Dufief, within three years next before the day of the impetration of the original writ of him, the said Henry F. Turton, did assume upon himself in manner and form as the said Henry F. Turton above against him complains, and this he prays may be inquired of by the country, &c.

And the said John L. Dufief, in like manner, &c.

Therefore, let a jury thereon appear before the court here immediately, by whom, and so forth, and who neither, and so forth, to recognize, and so forth, because as well, and so forth. Whereupon, for trying the issues aforesaid it is ordered by the court here that twenty persons from the pannel of petit jurors returned to the court here by the marshal of the Maryland district aforesaid be drawn by ballot. And thereupon the twenty persons being so drawn by ballot, and written upon two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of
16 the said parties having stricken out four persons from the said lists, thereupon the remaining twelve persons being called, come, to wit, Thomas Hope, Charles W. Benney, Robert M. Walmsley, Samuel R. Kirby, Joseph S. Henisler, Wm. T. Smith, Wm. H. Harden, Samuel B. Freeman, John B. Harns, Jesse Hess, Johnson Benson, and John L. Thomas, who being empanelled and sworn to say the truth in the premises, upon their oath do say as to the first issue within joined between the parties aforesaid, that the said John L. Dufief did not assume upon himself and promise in manner and form as the said Henry F. Turton above against him as the said John L. Dufief above by pleading hath alleged. And as to the second issue within joined between the parties aforesaid, the jurors aforesaid upon their oath aforesaid, do say that the said John L. Dufief did not at any time within three years next before the impetration of the writ, original of the said Henry F. Turton in this cause, assume upon himself in manner and form as the said Henry F. Turton within by replying hath alleged. And as to the last issue within joined be-

tween the parties aforesaid, the jurors aforesaid, upon their oath aforesaid, further say that the said several promises and assumptions in the declaration mentioned, did not, nor did any of them, accrue to the said Henry F. Turton, at any time within three years next before the impetration of the writ, original of the said Henry F. Turton in this cause, in manner and form as the said Henry F.
17 Turton by replying hath alleged.

Therefore, it is considered by the court here that the said Henry F. Turton take nothing by his writ aforesaid, but that he be in mercy for his false clamor, and that the said John L. Dufief go thereof without day, &c., and it is also considered by the court here that the said John L. Dufief recover against the said Henry F. Turton, the sum of for his costs and charges by him about his defence in this behalf expended unto the said John L. Duffef, by the court here, with his assent adjudged, and that he have thereof his execution, &c.

Memorandum.—Before the jurors aforesaid withdrew from the bar of the court here, the said Henry F. Turton, by his attorney aforesaid, tenders to the court here his bill of exceptions, which was by the court here signed and sealed, and which bill of exceptions is in the words and figures following, to wit:

Pl'tff's bill of exceptions.

TURTON
vs.
DUFIEF.

At the trial of his cause, the plaintiff, to support the issue on his part, gave evidence, by Ephraim Wheeler, tending to prove that prior to the 12 July, 1861, he had applied to the defendant for a loan of money, (the said witness and the defendant both then residing in Washington city,) that the defendant stated that he had other-
18 wise disposed of his money, but he thought he could get it for me from Mrs. Fowler, and subsequently told the witness that he had got the sum of $2,000 from Mrs. M. A. Fowler, a lady residing in Prince George's county, Maryland, and on the 12 July, 1851, the defendant paid said amount to the witness, and took from him the promissory note dated 12 July, 1851. made a part hereof.

$2,000. WASHINGTON, *July 12th*, 1851.

Twelve months after date I promise to pay to the order of John L. Dufief, two thousand $\frac{00}{100}$ dollars. Value received, with interest, payable quarterly.

E. WHEELER

Indorsed: By request of Mrs. M. A. Fowler, guardian, I invested the within amount of two thousand, which I this 12 day of July, 1851, transfer to the said M. A. Fowler, guardian of her three children.

JOHN L. DUFIEF.

1853.

Jan'y 4.	By cash	$150
24.	By cash	150
March 5.	By cash	500

That on the same day the said witness executed to Tchiffely the deed of trust dated on said 12 July, 1851, made a part hereof:

19 This indenture, made this twelfth day of July, in the year of our Lord one thousand eight hundred and fifty-one, between Ephraim Wheeler and Maria E. Wheeler, his wife, of the city of Washington, of the first part, Frederick A. Tschiffely, of the same place, of the second part: Whereas the said Ephraim Wheeler now stands indebted to John L. Dufief in the sum of two thousand dollars, current money, for which amount the said Wheeler has given to the said John L. Dufief his promissory note, dated this day, and payable in twelve months from the date thereof, with interest, (the interest to be paid quarterly,) and said Wheeler being desirous to secure the punctual payment of the said note, and the interest thereon, hath agreed to execute these presents, therefore this indenture witnesseth that the said Wheeler, for and in consideration of the premises, and further, the sum of one dollar in hand paid to him by the said Tschiffely, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath given, granted, bargained, sold, enfeoffed, conveyed, released, surrendered, and confirmed, and by these presents do give, grant, bargain, sell, enfeoff, convey, release, surrender, and confirm, unto the said Tschiffely, his heirs and assigns forever, the following parcel of property, to wit: All that piece or parcel of ground in the said city known and distinguished as part of lot 6, in Todd's subdivision of square three hundred and fifty-two, (352,) as the same is recorded in

20 the office of the surveyor of said city, beginning for said part at the southwest corner of said lot, and running thence east, with the line of Maryland avenue, eighteen feet; thence north, in a line parallel to the eastern boundary line thereof, one hundred and five feet two and a half inches, to the rear line of said lot; thence west nineteen feet three inches, to the northwest corner of said lot; thence south, with the western boundary line of said lot, one hundred and twelve feet four inches, to the place of beginning; together with the buildings, improvements, rights, privileges, appurtenances, and other hereditaments to the same belonging, or in anywise appertaining, and the remainders, reversions, rents, issues, and profits thereof, and all the right, title, interest, and estate of him, the said Ephraim Wheeler, in and to the same, and every part and parcel thereof forever, subject to the intent and purposes hereinafter mentioned. To have and to hold the said lot and premises, with the appurtenances, unto him, the said Frederick A. Tschiffely, his heirs and assigns forever. In trust, nevertheless, that if he, the said Ephraim Wheeler, his heirs or assigns, shall fail to take up and pay off the said promissory note at maturity, then and in that case the said Frederick A. Tschefferly, upon the request of the said John L. Dufief, shall advertise the said hereinbefore described premises, in some newspaper printed and published in the city of Washington, offering the same for sale, to the highest bidder for cash, or on certain day fixed specified, at least thirty days after the first insertion of the said ad-

vertisement in the said paper, and the said Frederick A.
21 Tschiffely, at the time and place appointed, shall proceed to sell the said hereinbefore described ground and premises to the highest bidder for cash, and shall convey the same to the purchaser or purchasers by good and sufficient deed or deeds, and shall apply the proceeds of the said sale, after paying all proper costs and expenses thereof, and reserving a reasonable commission for his services as trustee, as follows: In the first place to pay to the said John L. Dufief the amount which may be due on the said note, whether for the principal or interest, or for any proper costs, charges, or expenses; and in the next place, to pay over and restore the residue of the said proceeds, if any, to the said Ephraim Wheeler, his heirs, executors, administrators, or assigns. But if the said Ephraim Wheeler, his heirs or assigns, shall well and truly pay and satisfy the said note, with all the interest, costs, charges, or expenses that may become due thereon, then this conveyance shall be void and of none effect, and the lands and premises herein described be free, discharged, and released of all lien, claim, or demand, by reason hereof. And the said Ephraim Wheeler covenants, promises, and agrees for himself, his heirs, executors, and assigns, to and with the said Frederick A. Tschiffely, his heirs, executors, and assigns, that he, the said Ephraim Wheeler, his heirs and assigns, shall and will do no manner of act, directly or indirectly, to hinder, molest, retard, or in anywise impair or delay the said Frederick A. Tschiffely, his heirs, executors, or assigns, in the due execution of this trust; and
22 that, on breach of the payment of the said note or any part thereof, or for any interest, costs, or charges that may become due thereon, then the said Frederick A. Tschiffely, his heirs, executors, or assigns, shall and may peaceably enter upon, have, hold, and possess the premises hereinabove conveyed and described; and, upon the sale thereof, according to the terms of this trust, peaceably and quietly transfer, convey, release, and surrender the same and every part thereof to the purchaser or purchasers, and good and sufficient deeds of bargain, sale, enfeoffment, release, and confirmation, to make, execute, acknowledge, and deliver, free of all interference, impediment, claim, pretence, or demand whatsoever, in law or equity of law, of the said Ephraim Wheeler, his heirs and assigns forever.

In testimony whereof, the said Ephraim Wheeler and , his wife, hath hereunto set their hands and affixed their seals the day and year first hereinbefore written.

E. WHEELER. [SEAL.]
M. E. WHEELER. [SEAL.]

The words "his wife" on the first page, and the word "bidder" on the second page, were interlined before signing.

B. K. MORSELL.
J. W. BECK.

DISTRICT OF COLUMBIA, *Washington county, to wit:*

Be it remembered that on the twelfth day of July, in the year one thousand eight hundred and fifty-one, before the undersigned, two of

the justices of the peace in and for the county aforesaid, personally appears Ephraim Wheeler, who is personally well known to us as the party grantor within named, who acknowledges the within and foregoing instrument of writing to be his act and deed, and
23 the ground and premises, with the appurtenances therein mentioned, to be the right and estate of the therein named grantee, Frederick A. Tscheffeley, his heirs and assigns forever.

And now, at the same time, personally appeared Martha E. Wheeler, who also is personally well known to us, as the wife of the said Ephraim Wheeler, who also makes her acknowledgment of the same. And she being by us privately examined apart from and out of the presence and hearing of her husband, "whether she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fear or threats of, or ill usage by, her husband, or fear of his displeasure," she acknowledges and declares that she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fear or threats of, or ill usage by, her husband, or fear of his displeasure.

Taken and certified by—

B. K. MORSELL, *J. P.* [SEAL.]
J. W. BEEKS, *J. P.* [SEAL.]

Indorsed:

Rec'd 8th March, 1856, to be recorded, and the same day was recorded in Liber J. A. S., No. 112, folios 196, 197, 198, 199, one of the land records for Washington county, in the District of Columbia and examined by—

JNO. A. SMITH, *Cl'k.*

That the said Tschiffely was named as trustee by said defendant. The said witness testifies that the defendant informed him that the said Mrs. Fowler was investing said money for her children.
24 That the lot included in said deed of trust was worth $4,000 at the date thereof. That the said witness afterwards executed to Otho M. Linthicum the deed, a certified copy of which is a part hereof:

Ephraim Wheeler and wife to Otho M. Linthicum.—Deed of trust, recorded 4th day of May, 1855.

This indenture, made this twenty-sixth day of December, in the year eighteen hundred and fifty-four, by and between Ephraim Wheeler and Martha E. Wheeler, his wife, of Washington city, in the District of Columbia, of the first part, and Otho W. Linthicum, of Georgetown, in the same District, of the second part: Whereas the said Ephraim Wheeler is indebted unto the firm of Edward M. Linthicum & Co., partners trading in Georgetown aforesaid, in the sum of three thousand eight hundred eighty-three dollars and twenty-seven cents, current money of the United States, on his five promissory notes—one for the sum of seven hundred dollars, dated the fourteenth day of December, in the year aforesaid, and payable on

the fifteenth day of February, in the year eighteen hundred and fifty-five, with interest thereon from the date thereof; one for the sum of three hundred forty-three dollars and thirty-five cents; one for the sum of one thousand and seven dollars; one for the sum of nine hundred forty dollars thirty-seven cents; and one for the sum of eight hundred ninety-two dollars and fifty-five cents—each dated the twenty-second day of December, in the year eighteen hundred fifty-four, and payable, with interest from the said date, severally, on the fifteenth day of February, April, May, and June, in the year eighteen hundred fifty-five; and whereas the said Ephraim contemplates, in the prosecution of his business, to contract other debts with the firm on open account, or on his promissory notes, bills, bonds, or by indorsements on the notes, bills, or bonds of other persons, and in order to secure to the said firm the payment of the present existing and recited debt and all other and future debts which he, the said Ephraim Wheeler, may hereafter owe to the said firm on open account, or on his notes, bills, or bonds of other persons, with all interest which may accrue and be owing on any such debt, the said parties of the first part have agreed to execute this instrument of writing: Now, therefore, this indenture witnesseth, that the said parties of the first part, in consideration of the premises and of the sum of five hundred dollars current money of the United States in hand paid by the said Otho M. Linthicum, at the ensealing and delivery of these presents, the receipt of which is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, and confirm unto the said Otho M. Linthicum, his heirs and assigns, the following described lots, pieces, and parcels of land lying and being in Washington city, in the District of Columbia, that is to say, all that lot, piece, and parcel of land laid down as lot B, in the subdivision of original lot number one, in square three hundred fifty-two, as recorded in Liber A. K. of subdivisions at page 297, in the office of the surveyor of Washington city aforesaid; and also all that portion of lot C of the said subdivision of lot 6, of the said subdivision, which is contained between the dividing line of said lots B and C, and a line drawn from the front of said lot C to the back thereof, at a distance of two feet on said lot, from said dividing line, and equidistant from and parallel thereto the whole depth of said lot C; also all that part of a lot or parcel of land in said city known and distinguished as lot C, in William B. Todd's subdivision of square three hundred and fifty-two, as the same is recorded in the office of the surveyor of the said city, which is bounded as follows, to wit: Beginning for the same at the southwest corner of said lot, and run thence east, with the line of Maryland avenue, eighteen feet; then north, in a line parallel to the eastern boundary line thereof, one hundred five feet two and a half inches, to the rear line of said lot; then west nineteen feet three inches, to the northwest corner of said lot; then south, with the western boundary line of said lot, one hundred and twelve feet four inches, to the place of beginning; with all and singular the buildings, improvements, rights,

and appurtenances to the same belonging. To have and to hold the same unto the said Otho M. Linthicum, his heirs and assigns, for the uses, trusts, and purposes following, to wit, until the said
27 Ephraim Wheeler, his executors, administrators, or assigns, shall make default in the payment when at maturity, of some one or more of the said recited promissory notes, or of some debt when due and actually demandable, which may be hereafter contracted by the said Ephraim Wheeler with the said firm of Edward M. Linthicum & Co., to permit the said parties of the first part, their heirs and assigns, to have the possession of the said granted premises and take rents and profits thereof for their own use; and if the said debts now existing and hereafter to be contracted as aforesaid, be fully paid to the person or persons entitled to receive such payment, to release and reconvey the said granted premises to the said Ephraim Wheeler, his heirs and assigns, at his or their costs. But if the said Ephraim Wheeler, his heirs, executors, administrators, and assigns, shall fail to pay the said recited promissory notes, or any one of them, when at maturity, to the said Edward M. Linthicum & Co., or their assigns, or shall fail to pay any debt which he, the said Ephraim Wheeler, may hereafter contract with and owe to the said Edward M. Linthicum & Co., whether on open account or as drawer, acceptor, or indorser of any promissory note, bill of exchange, or bond, the said debt being then actually due and payable, then actually due and payable. then it shall and may be lawful for the said Otho M. Linthicum and his heirs, as the case may require, at the request of the person or persons holding any such note or notes in arrears and unpaid, or to whom any such debt hereafter contracted by the said Ephraim
28 Wheeler with the said Edward M. Linthicum & Co., in manner aforesaid, may be owing and in arrears, to sell the said granted premises or any part thereof at public auction to the highest bidder, at such time and place and on such terms and after such previous notice of the manner, time, place, and terms of sale, as to him or them making such sale shall appear most for the advantage of all persons interested therein; to receive the proceeds of sale from the purchaser, who shall not be required to see to the application thereof; the same being paid to convey the property sold to such purchaser, his, her, or their heirs and assigns, at his, her, or their costs, and the said proceeds shall be applied as follows, to wit: First, to pay all the costs and expenses attending the execution of said trusts; secondly, to pay to the said Edward M. Linthicum & Co., or to their assigns, the said notes, principal and interest thereon, or such of them as may be unpaid at the time of such sale, whether they be then at maturity or not; thirdly, to pay to the said Edward M. Linthicum & Co., or their assigns, any other debt which the said Ephraim Wheeler may hereafter contract with and owe to the said firm, or their assigns, whether on open account or as drawer, acceptor, or indorser of any promissory note, bill of exchange, or bond, and all interest which may have accrued thereon; and, lastly, if there be any surplus of such proceeds of sale after satisfying the objects aforesaid, to pay the same to the said Ephraim Wheeler, or his assigns. And the said Ephraim

Wheeler, for himself and his heirs, doth hereby covenant with the said Otho M. Linthicum, his heirs and assigns, that he, the
29 said Ephraim Wheeler, is seized of a good estate in fee simple on the said granted premises, and hath good right and title to convey the same to him and his heirs and assigns in manner aforesaid, and that he, the said Ephraim Wheeler and his heirs, will by these presents warrant the said granted premises to the said Otho M. Linthicum, his heirs and assigns, against all persons and claims whatsoever; and further, that he, the said Ephraim Wheeler, and his heirs and assigns, shall and will, during all the time that the said recited debts, or any future debt contracted by him with the said firm, shall be unpaid, and a charge on the said granted premises, keep the buildings now thereon, and such as may be hereafter erected thereon, insured against loss by fire in at least the sum of dollars, in some good office or offices, and will assign the policy for effecting such insurance to the said Otho M. Linthicum and his heirs, as additional security for the payment of the said mentioned debts, present and contingent: and if the said Ephraim Wheeler, and his heirs and assigns, shall fail to make such insurance and assignment as aforesaid, it shall be lawful for the said Edward M. Linthicum & Co., or their assigns, to procure such insurance, and the cost thereof shall be a present debt and a lien on the said granted premises.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first aforesaid.

E. WHEELER. [SEAL.]
MARTHA E. WHEELER. [SEAL.]

Witness: B. K. MORSELL.
T. C. DONN.

30 WASHINGTON COUNTY, *District of Columbia, to wit:*

We, Benjamin K. Morsell and Thomas C. Donn, two justices of the peace in and for Washington county, in the District of Columbia, do hereby certify that Ephraim Wheeler and Martha E. Wheeler, his wife* being both personally well known to us to be the persons who executed the said deed; and the said Ephraim Wheeler acknowledges the same to be his act and deed. And at the same time the said Martha E. Wheeler, the wife of the said Ephraim, being by us examined privily and apart from her said husband, and having the deed aforesaid fully explained to her, also acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under our hands and seals this 24th day of January, in the year 1854.

B. K. MORSELL, *J. P.* [SEAL.]
T. C. DONN, *J. P.* [SEAL.]

See next page for omission at 5th line:

*parties to a certain deed dated the twenty-sixth day of December, in the year eighteen hundred fifty-four, and hereunto annexed, personally before us in our said county, the said Ephraim Wheeler and Martha E. Wheeler, his wife,

DISTRICT OF COLUMBIA, *County of Washington, to wit:*

I, John A. Smith, clerk of the circuit court of the District of Columbia for the county of Washington, do hereby certify that
31 the aforegoing and annexed deed from Ephraim Wheeler and wife to Otho M. Linthicum is truly and correctly copied from Liber J. A. S., No. 97, folio 149 et seq., one of the land records for the county of Washington and district aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court this third day of November, A. D.

[SEAL.] JNO. A. SMITH, *Cl'k.*

And that the said last deed included with other property the same property described in the aforesaid deed of trust to Tchiffily. That all the property described in said deed to Linthicum was afterwards sold at the instance of said Linthicum, and the whole proceeds of sale left only a surplus of some thirty dollars after paying the claim of said Linthicum and costs of the sale.

The said witness further testified that on the 18th of November, 1857, (the date of the judgment hereinafter mentioned,) he owned other property in Washington, but the same was under incumbrance, and when sold did not bring any surplus over the liens thereon, but at the expiration of the stay of execution on the judgment hereinafter mentioned, to wit, on the 18th November, 1859, he had no property whatever on which an execution could have been levied.

The witness further testified that shortly before 12 July,
32 1851, he, and the defendant were negotiating for the formation of a copartnership between them, but that the same was not consummated; and also that on the 12 July, 1851, the defendant was indebted to the witness in an account current which he subsequently paid.

The plaintiff then read in evidence the record of a judgment made part hereof.

DISTRICT OF COLUMBIA, *to wit:*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the third Monday of October, being the nineteenth day of the same month, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States the eighty-second.

Present, James Dunlop, chief judge; the Hon. James S. Morsell, William M. Merrick, assistant judges; Jonah D. Hoover, esquire, marshal; John A. Smith, clerk.

In the record of the proceedings of said court, among others, are the following, to wit:

HENRY F. TURTON
vs.
EPHRAIM WHEELER. } 1,211, appearances, October term, 1857.

Be it remembered, that heretofore, to wit, on the eighteenth
33 day of November, in the year of our Lord one thousand eight hundred and fifty-seven, the said plaintiff, by Joseph H. Brad-

ley, esquire, his attorney, and the said defendant, in his own proper person, appeared in court here, and docketed the above case, the said plaintiff by his attorney aforesaid, at the same time declared against the said defendant, in form following, to wit:

DISTRICT OF COLUMBIA, *Washington county, to wit:*

Ephraim Wheeler, late of the county aforesaid, was attached to answer unto Henry F. Turton, in a plea of trespass on the case, and so forth.

And thereupon the said plaintiff, by Bradley and Bradley, his attorneys, complains, that, whereas, heretofore, to wit, on the 12th day of July, in the year of our Lord eighteen hundred and fifty-one, at Washington, to wit, at the county aforesaid, the said Wheeler then and there made his certain note in writing, commonly called a promissory note, bearing date the day and year aforesaid, and thereby said defendant promised to pay to one John L. Dufief, or order, the full and just sum of two thousand dollars, current money of the United States, for value received, with interest, payable quarterly, and then and there delivered the said note to the said Dufief.

And the said John L. Dufief, to whom or to whose order the payment of the said sum of money in the said note mentioned was to be made, afterwards, and before the time limited in the said note
34 for the payment thereof, to wit, on the day and year aforesaid, at the county aforesaid, indorsed the said note, and thereby ordered and appointed the said sum of money in the said note mentioned to be paid to the said Turton, plaintiff aforesaid, and then and there delivered the said note, so indorsed, to the said plaintiff.

And the plaintiff avers that afterwards, and after the expiration of the time limited in the said note for the payment thereof, to wit, on the 12th day of July, in the year eighteen hundred and fifty-two aforesaid, he showed and presented the said note, with the indorsements so made thereon as aforesaid, to the said Wheeler, and then and there required the said Wheeler to pay the same; but the said Wheeler did not then, or at any time since, pay the same, or any part thereof, to the said plaintiff, but then and there wholly refused so to do.

By reason whereof and by force of the statute in such case made and provided, the defendant became liable to pay the said sum of money in the said note mentioned to the plaintiff, (according to the tenor and effect of the same,) and being so liable in consideration thereof, then and there undertook and promised to pay the same to the plaintiff according to the tenor and effect thereof, whenever afterwards he should be thereto requested.

And whereas the defendant afterwards, to wit, on the 12th
35 day of July, in the year eighteen hundred and fifty-two, at the county aforesaid, was indebted unto the plaintiff in another sum of two thousand dollars like money, for the like sum of money by the plaintiff to and for the use of the defendant, before that time paid, laid out, and expended, at the special instance and request of the defendant, and for other money by the plaintiff before that time

lent and advanced to the defendant, at his special instance and request; and for other money by the defendant before that time had and received to the use of the plaintiff, and being so indebted, the defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the county aforesaid, and promised to pay to him the last mentioned sum of money when afterwards he should be thereunto required.

Yet the defendant the said several sums of money herein mentioned, or any part thereof, (although often thereto requested, to wit, on the day and year last aforesaid, at the county aforesaid, and often afterwards,) has not paid, but the same or any part thereof to pay has hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff in the sum of five thousand dollars, current money, and therefore he brings suit, and so forth.

BRADLEY & BRADLEY,
For the Plaintiff.

And the said plaintiff, by his attorneys aforesaid, files in court here the following note, to wit:

36 $2,000. WASHINGTON, *July 12th*, 1851.

Twelve months after date, I promise to pay to the order of John L. Dufief, two thousand dollars, value received, with interest, payable quarterly.

E. WHEELER.

On the back of the said note are the following indorsements, to wit:

By request of Mrs. M. A. Fowler, guardian, I invested the within amount of two thousand, which I, this 12th day of July, 1851, transfer to the said M. A. Fowler, guardian of her three children.

JOHN L. DUFIEF.

1853—Jan'y 4, by cash	$150
" 24, by cash	150
March 5, by cash	500

And thereupon, on the motion of the said plaintiff, by his attorneys aforesaid, it is ruled by the court here that the said defendant answer to the declaration aforesaid of the said plaintiff in the plea aforesaid; and the said defendant, in his own proper person aforesaid, saith that he cannot deny the action aforesaid of the said plaintiff, nor but that the said plaintiff has sustained damages to the sum of five thousand dollars, current money, by reason of the non-performance of the promise and assumption aforesaid, in manner and form as the
37 said plaintiff above in his declaration hath declared; therefore it is considered by the court here that the said plaintiff recover against the said defendant as well the sum of five thousand dollars, current money, his damages aforesaid, in form aforesaid confessed to be sustained by occasion of the non-performance of the promise and assumption aforesaid, as also the sum of nine dollars and ninety-nine

cents by the court hereunto, the said plaintiff on his assent adjudged for his costs and charges by him about his suit in this behalf laid out and expended; and the said defendant in mercy, and so forth.

Test: JNO. A. SMITH, *Clerk.*

Memorandum.—Judgment rendered in this case on the 18th day of November, 1857, for the sum of $5,000, the damages laid on the declaration; the said damages to be released on the payment of $2,000, with interest from 12th July, 1857, till paid, and $9.99 costs of suit, with stay of execution of two years.

Credits:

1853.

Jan'y 4	$150
Jan'y 24	150
March 5	500

Test: JOHN A. SMITH, *Cl'k.*

38 DISTRICT OF COLUMBIA, *Washington county, to wit:*

I, John A. Smith, clerk of the circuit court of the District of Columbia for the county of Washington, hereby certify that the foregoing is a true and perfect transcript of the record of the proceedings had in the said court, in the case of Henry F. Turton against Ephraim Wheeler, taken from the records and minutes of said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court this 23d day of October, A. D. 1860.

[SEAL.] JNO. A. SMITH, *Cl'k.*

DISTRICT OF COLUMBIA, *to wit:*

I, James Dunlap, chief judge of the circuit court of the District of Columbia, hereby certify that John A. Smith, who has given the above certificate, was at the time thereof clerk of the circuit court of the District of Columbia, for the county of Washington, and that his attestation is in due form. Given under my hand this 23d day of October, A. D. 1860.

JAS. DUNLOP.

And a copy of the warrant to confess said judgment, dated 11 June, 1856, made a part hereof.

39 In the C. C. for the D. C., for Wash. Co., March term, 1856.

HENRY F. TURTON
vs.
EPHRAIM MILLER.

To Jno. A. Smith:

D'R S'R: You will please to docket a suit in the s'd c't in the above entitled cause, with a declaration in ass. And enter judg't for 2,000 damages to be released on pay't of bal. appearing due on note herewith filed, with int. and all taxable costs, with a stay of execution for two years, and this shall be your sufficient warrant.

Witness my hand and seal, 11 June, 1856.

E. WHEELER.

And which it is agreed was filed, and is to be taken as part of said record.

The plaintiff also read in evidence two letters which are admitted to be in the handwriting of the defendant, and are made a part hereof.

MILLWOOD, *March* 20, '56.

DEAR HENRY: Inclosed find advertisement of Wheeler's property. I placed the papers in the trustee's hands as you desired, and told him to say to Mr. W. if he would make arrangement with
40 ten days or 2 weeks to close up the matter, to give him the time. Mr. W. told him it was no use to try, as he was satisfied he could not succeed, and requested him to sell the property; and Mr. S. accordingly proceeded and advertised the property. I am sorry this has been the result of my desire to oblige Wheeler.

Well, sir, now for a talk about our gander that won't have anything to do with the geese. In the morning when we turn him out he runs out to an old "ash barrel," and there remains until we put him up of a night; he is certainly a bachelor of the oldest stamp; there is no accounting for taste; he prefers solitude to the coquetish manner of 3 settled dames. It is the first gander I ever saw afraid of a goose; if, in your travels, you can find one not quite so bashful procure him and oblige. Lansing is not so well; his ankle has healed up in the first place and now seems to be getting on top of the instep and on the inside near his large toe; his arm is worse and I dread the result. Poor little sufferer, my heart aches to see him so much reduced and so little prospect of recovery. Amelia is almost worn out, and is quite sick; the girls, Lizzie, Nett, and Kate, are fat and growing finely, and I am getting as fine as silk. All our colored people keep well, except Jane, and she, I fear, never will get well; Ann Maria and Bob are well. I hope as soon as the weather will permit you will find it convenient to come up and see us. My love to you and Margaret, and family, Mary, and family, and remain.
41 Yours truly,

JOHN L. DUFIEF.

DEAR HENRY: Your letter was received, of the 3d inst., on the 7th, and as I intended to Washington, concluded I would not write until I seen Mr. Bradley and Wheeler. I have been here all day doing all I can to close up this unpleasant piece of business.

It is painful to illude to this affair, and in all my life never had anything to worry me as much as this has. I should of written sooner but was waiting an action of the court. That order has been obtained, as you can see from Mr. B.'s letter, and the result. I was in perne of Wheeler half the day, yesterday, and he is in the prosecution of an agency, and it was some time before I could meet with him. During our conversation all particulars relating to the transaction was brought up, and he assures me he regretted the occurrence, but he had lost heavy am't from the recent failures of Garret, Eutines Co., Brown, and others, and present he had nothing to offer as security for the am't, but was willing to do any he could, or I

could suggest. I then proposed he should give me a judgment for the am't of balance, and, in order to enable him to start, proposed a stay of execution for two years from the recording of said judgment; he agreed, and we went up to Mr. Bradley and had such a one drawn by Mr. Bradley and signed by himself; this, after consulting
42 with S. Fowler and Bradley, seemed to be the best course, as it put the claim in a shape he can be reached without a tedious course of law. Wheeler has excellent ability for business, and has made a great deal of money, and through his indulgence has lost all; but now if he could collect ½ of the am't of his book debts would be free from the world in point of his debts. I have no doubt he will pay every dollar, and God knows I regret this should of occurred, more particular as I acted the voluntary part of a friend, and from the purest motives. How often it happens when we act from the best and most sincere motives we fail to accomplish our object.

Amelia and myself came down this time with Laurence; he is under the treatment of Mrs. Emmerson, of Alexandria, and has been for near two weeks, and I am candid to say he is a great deal better and strong hopes of his recovery. All the rest of our little family enjoy good health and joins in love to you and Margaret. I shall write you in a few days again, and at the earliest moment come down to see you.

Your friend,

J. L. DUFIEF.

The plaintiff further gave evidence by Joseph H. Bradley to show that he was counsel for some six or seven of the heirs of Fowler, who died intestate and without issue in New Orleans some time prior to the 12th July, 1851; that the widowed mother of said de-
43 fendant was one of the heirs of said Fowler, and was represented by the defendant, who went to New Orleans under powers of attorney from the heirs for whom said Bradley was counsel, and obtained several hundred thousand dollars for said heirs; that among said powers of attorney was one which the def't had obtained from said Mrs. M. A. Fowler in her own right and as guardian of her infant children, then residing with her in Prince George's county aforesaid; that the said M. A. Fowler had no right to said money, except as such guardian, but being apprehensive of trouble from the creditors of her deceased husband in respect thereto, she left the said money (which the def't has obtained for her as such guardian in New Orleans) in the hands of the defendant; that the witness Bradley knew nothing of the loan of said money to the said Wheeler until about October, 1851, when the def't being about to return to New Orleans, came with said Mrs. M. A. Fowler to see said Bradley, on which occasion both of them informed said Bradley that the note and deed of trust executed by Wheeler were then in the possession of said M. A. Fowler; that the witness had no further knowledge of said matter until the spring of 1856, when Turton came to Washington, having married said Mrs. Fowler, and consulted the witness, as his counsel, in regard to said claim against Wheeler; that after the

discovery by him of the recorded deed in favor of said Lin-
44 thicum the said Turton charged the def't with having caused the loss of said debt by his neglect to record the deed of trust to Tschiffely, when the def't denied his obligation to record said deed of trust or his responsibility therefor, declaring that he had only acted in making said investment as the friend of Mrs. Fowler without any reward; that in the month of June, 1856, Dufief came to Washington, having previously removed to Montgomery county, in Maryland, and came to see witness; that the witness on the 10 June, 1856, wrote the letter of that date, signed by him, made a part hereof.

WASHINGTON, 10 *June*, 1856.

D'R SIR: I have made proper inquiries into the property intended to secure the debt due by Mr. Wheeler to Mrs. Turton, and the result is as bad as it well can be.

The deed of trust given by Mr. Wheeler to Mr. Tschiffely is upon lot 6, when in fact it ought to have been lot C, yet the description is correct otherwise, and I suppose it might be enforced.

But there is a prior deed of trust to secure Mr. Linthicum, and by a decree of the circuit court the property has been sold to satisfy that debt, and brought only $2,650 00
The debt due to Linthicum and expenses are 2,558 72

Leaving a balance of only 91 28

The property is thought to be worth only about $3,000.
45 Linthicum purchased it at the trustee's sale, and is willing to assign his purchase to you or any one that will take it.

On this point I cannot advise you, for I know too little of the value of the property in that neighborhood.

Y'r ob't ser't,

JOS. H. BRADLEY.

And either gave it to Dufief to be sent to Turton, or himself sent it to Turton, he cannot say which; that on the 11th June, 1856, Wheeler came to the office of witness and signed the power of attorney of that date, referred to above; that the witness does not recollect whether said Dufief was then present, but he thinks no one was present but Samuel Fowler (a cousin of Mr. Fowler's children) and the said Wheeler. The witness does not recollect why said judgment was not confessed until the 18th Nov., 1857, nor has he any recollection of seeing the plaintiff in Washington at the time the warrant to confess the judgment was signed or the suit was filed in court and the judgment confessed. The witness stated that had letters written by Turton to him during the transactions referred to by him, but he regards them as confidential, being written to him as counsel.

The witness Wheeler in reply to defendant's cross-interrogatories said that he was perfectly solvent and able to pay the note for $2,000 referred to in his examination in chief at time it was made, at

the time it became due, and up to the time of the execution of deed to Linthicum; that no demand was made upon him for payment
46 of the amount of the note at any time before the execution of that deed; he paid to Mrs. Fowler, who held the note, the amount of eight hundred dollars, credited thereon at her request, she then stating that it was wanted to pay for schooling of her children; that he also paid to her and to Turton, the plaintiff, her husband, the interest mentioned in the receipts made part hereof.

WASHINGTON, *Novem.* 12, 1851.

Received of E. Wheeler thirty dollars in full for 1 quarter's interest on note for $2,000, dated Jan'y 12, 1851.

$30. MARGARET A. FOWLER.

WASHINGTON, *April* 3, 1852.

Received of E. Wheeler sixty dollars for 2 quarters' interest on note for two thousand dollars, due to me on the 12th July, 1852.

MARGARET A. FOWLER.

Dollars, $60. WASHINGTON, *Decem.* 13, 1852.

Received of E. Wheeler sixty dollars in full for interest up to 12th January, 1853.

MARGARET A. FOWLER.

AUGUST 3, 1854.

Received of Mr. E. Wheeler fifty dollars as interest on insurance policy of twelve hundred dollars, held by Mrs. Margaret A. Fowler, formerly, and now Mrs. Margaret A. Turton.

$50. HENRY F. TURTON.

47 Dollars, $50. WASHINGTON, *December* 13, 1854.

Received of Ephm. Wheeler fifty dollars on account of money loaned him by Mrs. Margaret A. Fowler, now Mrs. M. A. Turton.

HENRY F. TURTON,
The husband of the above named.

Witness: THOS. C. WHEELER.

WASHINGTON, ———.

Mrs. M. A. Fowler to E. Wheeler, Dr.

Novem. 15, 1851.	To cash paid, int. on note			$30 00
April 3, 1852.	Do			60 00
Decem. 13, 1852.	Do			60 00
Sept. 17, 1853.	Do			30 00
August 3, 1854.	Do			50 00
Dec. 12, 1854.	Do			50 00
Dec. 13.	To 1 p'r shovel and tongs		$1 50	
	1 set sleigh bells		2 00	
	1 p'r hubs and hinges		1 50	
	1 gro. 2m H 13 screws		75	
	Cash paid freight		25	
				6 00

Per Mr. Turton:

Jan'y 18, 1855.	Bills rec'd for A. A. Smoot's note at 90 days from 18 Jan'y, 1855, per Mr. Turton	66 64
May 16, 1855.	To hand bell p'r Mr. Turton	1 00
		353 64

He paid no money on account of the principal of said note to the defendants, nor to any one but to Mrs. Fowler and her hus-
48 band, the plaintiff; that Mrs. Fowler called upon him first some four months after note was given, and he paid her the first quarter's interest; she then told witness that she had the note and deed, but did not show them to witness. He knew, however, at the time he borrowed money that it was the money of Mrs. Fowler, as guardian of her children. Witness first saw note and indorsement thereon at the time of the payment of the first sum of one hundred and fifty dollars on account of principal indorsed on said note.

The witness Bradley said in reply to cross-interrogatories of defendant's counsel that in the fall of 1851 the defendant Dufief went to New Orleans, being out of health and having business in relation to estate of Fowler, spoken of in the examination of witness in chief; that before he left Mrs. Fowler and defendant came to witness's office, and they both told witness that the deed of trust from Wheeler and the note secured thereby had been handed by defendant to Mrs. Fowler some time previously. This interview was prior to her securing the first quarter's interest from Wheeler; that in 1854 Mrs. Fowler married the plaintiff, who afterwards came to Washington and set up a claim against the defendant for negligence in failing to record deed of trust, and employed witness as his counsel, and as such counsel he acted throughout the whole matter. The defendant denied his responsibility,
49 either moral or legal, and said that he had acted as Mrs. Fowler's friend merely, and handed to the note and deed to her immediately upon the execution of the same. Turton, the plaintiff, gave deed to Sam'l Fowler to hand to Tschiffelly, the trustee, and it was then discovered that it had not been recorded, and was cut out by the subsequent deed to Linthicum. This was in spring of 1856. Turton, the plaintiff, then wished to negotiate with Wheeler about the debt, but Wheeler refused to have anything to say to him, as witness thinks, because they had some quarrel, and some personal ill-feeling existed. The plaintiff then wrote or sent to Dufief to come to Washington and arrange the settlement with Wheeler, and he came and was in Washington several days engaged about it, and procured the power of attorney to confess judgment filed in pl'ff's testimony, but denied all responsibility whatever in the matter. He said he was willing to do what he could to arrange the matter for plaintiff. Wheeler came to my office, and I drew the power to confess judgment as attorney for plaintiff. The defendant was not present. Witness did not act as counsel of defendant; was not employed by

him, but by plaintiff. Witness could not say why the delay from June, 1856, to Nov., 1857, in the entering up judgment was made.

The pl'ff then read the agreement of facts.

50 U. S. circuit court.

TURTON *vs.* DUFIEF.

It is agreed as follows:

1. That the annexed record of a suit brought in the name of Turton *vs.* Ephraim Wheeler, and of a deed from said Wheeler and wife to Linthicum, are to be considered properly authenticated and certified. Also, that the annexed instrument of writing is the original deed executed by said Wheeler and wife to Tschiffely, and that the same was recorded as it purports to be.

2. It is also agreed that the plaintiff married Mrs. M. A. Fowler prior to the first day of March, 1856, and that the plaintiff is a citizen of the State of Missouri, and that John L. Dufief is a citizen of Maryland.

R. J. BRENT, *for Pl'ff*.
J. DEAN SMITH, *for Def't*.

Nov. 6, 1860.

Here the plaintiff offered the following prayers:

Plaintiff's prayer.

If the jury believe that the defendant as the bailee of two thousand dollars belonging to the infant children of M. A. Fowler undertook and agreed with the said M. A. Fowler, she then being guardian of said children, that he would invest said money on good and
51 sufficient security for its repayment; and if they further find that the defendant entered upon the performance of his said undertaking and made said investment in the manner stated in the evidence, but that said investment became worthless and was wholly lost because of the neglect of the def't to record said deed of trust to Schiffely, then the def't is liable for such damages as the said plaintiff hath sustained by the breach of the said undertaking of the defendant. Provided the jury find that at the time of said investment the said def't knew that the said M. A. Fowler resided with her children in Prince George's county and State of Maryland, and was guardian of her said children by the appointment of the proper court in said Prince George's county, and that said money belonged to her as said guardian, and not otherwise; and provided the jury find the intermarriage of said plaintiff and said M. A. Fowler prior to the institution of this suit.

Per Mr. Turton:

Jan'y 18, 1855.	Bills rec'd for A. A. Smoot's note at 90 days from 18 Jan'y, 1855, per Mr. Turton	66 64
May 16, 1855.	To hand bell p'r Mr. Turton	1 00
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He paid no money on account of the principal of said note to the defendants, nor to any one but to Mrs. Fowler and her husband, the plaintiff; that Mrs. Fowler called upon him first some four months after note was given, and he paid her the first quarter's interest; she then told witness that she had the note and deed, but did not show them to witness. He knew, however, at the time he borrowed money that it was the money of Mrs. Fowler, as guardian of her children. Witness first saw note and indorsement thereon at the time of the payment of the first sum of one hundred and fifty dollars on account of principal indorsed on said note.

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2. It is also agreed that the plaintiff married Mrs. M. A. Fowler prior to the first day of March, 1856, and that the plaintiff is a citizen of the State of Missouri, and that John L. Dufief is a citizen of Maryland.

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Nov. 6, 1860.

Here the plaintiff offered the following prayers:

Plaintiff's prayer.

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51 sufficient security for its repayment; and if they further find that the defendant entered upon the performance of his said undertaking and made said investment in the manner stated in the evidence, but that said investment became worthless and was wholly lost because of the neglect of the def't to record said deed of trust to Schiffely, then the def't is liable for such damages as the said plaintiff hath sustained by the breach of the said undertaking of the defendant. Provided the jury find that at the time of said investment the said def't knew that the said M. A. Fowler resided with her children in Prince George's county and State of Maryland, and was guardian of her said children by the appointment of the proper court in said Prince George's county, and that said money belonged to her as said guardian, and not otherwise; and provided the jury find the intermarriage of said plaintiff and said M. A. Fowler prior to the institution of this suit.

The defendant then offered the following prayers:

Defendant's prayers.

1. The def'd't prays the court to instruct the jury that the plaintiff having offered no proof of the and notice of non-payment of the note, cannot recover against the def't as indorser.

2. That if there be any negligence in investing the money and in failing to have the deed from Wheeler to Tschiffely recorded, so that any right of action accrued to the plaintiff, such right of action accrued at the latest at the time of the maturity of the note in
52 July, 1852, and more than three years having elapsed between that time and the bringing of the suit, the action is barred by the act of limitation.

3. That if the jury find from the evidence aforesaid that the def't undertook at the request of Mrs. M. A. Fowler as a friend and not for compensation, to find an investment for her for the 2,000 in the note mentioned in July, 1851, and did loan the same to Ephraim Wheeler on the 12 July, 1851, and took from said Wheeler his note in the proceedings mentioned for the same, and the deed of trust delivered to Tschiffely on real property in Washington city adequate to secure said sum of money, and that the def't delivered said deed and the note with the indorsement thereon in the handwriting of the def't to said M. A. Fowler either on the date of said indorsement or shortly thereafter and before the first quarter's interest fell due, and that at the time of such loan Wheeler was solvent and able to pay the said sum, and so continued at the maturity of said note and thereafter up to the fall of 1854, and that he did in fact pay all and such parts of the principal up to that time as were demanded of him, and that there was no demand of the whole principal at any time prior to the fall of 1854.

And if the jury shall further find that the deed of trust from Wheeler to Linthicum for the property previously conveyed to Tschiffely to secure the note in the proceedings mentioned was not executed till the 26 day of December, 1854, and not recorded till the 24 January, and that up to that time the property in the deed
53 to Tschiffely was adequate to pay the note.

And shall further find that Turton, the plaintiff, accepted from said Wheeler the judgment entered in the circuit court of the District of Columbia at Oct. term, 1857, under Wheeler's power of att'y of the 11 June, 1856, for the debt due by the note aforesaid, with a stay of execution for two years—

Then the jury are not entitled to find any negligence in the defendant, and the verdict must be for the def't.

But the court refused to grant the same, and gave the following instruction to the jury:

Court's instruction.

To the refusal to grant the instructions asked for by him, and to the giving of the instruction referred to above and herein inserted, the plaintiff excepts, and asks the court to sign and seal this bill of exception, which is done this 10th day of November, 1860.

WILLIAM F. GILES. [SEAL.]

55 And now here at this day, to wit, on the first day of March, in the year of our Lord one thousand eight hundred and sixty-five, the said Henry F. Turton produced to the said circuit court here the writ of the United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next; which said writ of error is in the words and of the tenor following, to wit:

57 THE UNITED STATES OF AMERICA, *ss:*

To the judges of the circuit court of the United States for the fourth circuit in and for the Maryland district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court before you, or some of you, between Henry F. Turton, plaintiff, and John L. Dufief, defendant, a manifest error hath happened, to the great damage of the said Henry F. Turton, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday in December next, in the

[redacted]

cause, if any there be, why the judgment rendered against the said Henry F. Turton, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness my hand and seal this 9th day of November, in the year of our Lord one thousand eight hundred and sixty-five.

[SEAL.] WILLIAM F. GILES.

Nov. 22d, 1865.

I acknowledge notice of the above citation.

JULIAN SMITH,
Att'y of Def'ts.

61 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things concerning the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

Appeal bond.

Know all men by these presents, that we, Henry F. Turton and M. Bannon, are held and firmly bound unto John F. Dufief in the full and just sum of two hundred dollars, lawful money of the United States, to be paid to the said Dufief, or his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 29th day of November, in the year of our Lord one thousand eight hundred and sixty-five.

Whereas, at the circuit court of the United States for the fourth

circuit and district of Maryland, begun and held at the city of Baltimore, on the first Monday of November, in the year of our Lord one thousand eight hundred and sixty, the said John F. Du-
62 fief, recovered his judgment, against the said Turton, for his costs and charges by him about his defence in that behalf laid out and expended; and whereas the said Turton hath sued out the writ of the United States of America for the correcting of errors, and a citation directed to the said Dufief, citing and admonishing him to be and appear at a Supreme Court of the United States to be held at the city of Washington on the first Monday in December then next, to show cause, if any there be, why the judgment aforesaid, so as aforesaid rendered, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties aforesaid in this behalf:

Now, the condition of the aforegoing obligation is such that if the said Turton shall well and truly prosecute with effect his said writ of error, and pay unto the said Dufief, his heirs, executors, administrators, and assigns, his costs and charges aforesaid, adjudged unto him by the said circuit court, and also all such damages, costs, and charges as may be awarded unto him by the said Supreme Court, in case he, the said Turton, shall fail to make good his said plea, then the above obligation to be void and of none effect; otherwise, to be and remain in full force and virtue in law.

[SEAL.] M. BANNON.

Signed, sealed, and delivered in presence of—
A. V. MILHOLLAND.

63 Indorsed: Bond approved 30 Nov., 1865.
WILLIAM F. GILES.

THE UNITED STATES OF AMERICA, *District of Maryland, to wit:*

I, James W. Chew, clerk of the circuit court of the United States for the fourth circuit, in and for the Maryland district, do hereby certify that the aforegoing is truly taken and made from the record and proceedings of the above cause in the said circuit court.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said circuit court this thirtieth day of November, anno Domini 1865.

[SEAL.] JAMES W. CHEW, *Clerk Circuit Court.*

IN THE SUPREME COURT.

No. 97.—DECEMBER TERM, 1867.

HENRY F. TURTON
vs.
JOHN L. DUFIEF.

This is a writ of error to the Circuit Court for the District of Maryland.

The facts of the case, and the rulings of the Court below, do not present any conceivable grounds for a review by this Court.

In the month of July, 1851, Mrs. Margaret A. Fowler, the guardian of her three infant children, residing in Prince George's County, Maryland, had some money in the hands of the Defendant to invest for her wards, so as to avoid any controversy with the creditors of her deceased husband. She applied to the Defendant, her relation and friend, to assist her gratuitously in making such investment. On the 12th July, 1851, he lent to Ephraim Wheeler, then a merchant in good standing and credit in Washington, $2,000 of that money, and took from him his promissory note for that amount at twelve months, with interest, payable quarterly. The note was made payable to him, in order to conceal the transaction, and he endorsed it, and subsequently delivered it to her as follows:

"By request of Mrs. M. A. Fowler, guardian, I invested the within amount, (two thousand,) which I, this 12th day of July, 1851, transfer to the said M. A. Fowler, guardian of her three children.

"JOHN L. DUFIEF."

To secure the payment of this debt and interest, he took from said Wheeler a deed of trust to Frederick A. Tschiffely, by which Wheeler conveyed to him improved property in the City of Washington, with a good title and free from incumbrance, worth $4,000; besides which, Wheeler himself was perfectly able to pay it up to and after the time the note became due. This deed he also delivered to Mrs. Fowler. The precise date at which these instruments were delivered to her is not fixed; but it is proved that she had them both sometime previously to the month of October, in the year 1851, and it is insisted that the date of the indorsement on the note shows they were delivered in July, 1851, as the Defendant had also stated to the Plaintiff.

From some cause this trust deed was never recorded until 8th of March, 1856; but there is nothing in the record to connect the Defendant with that delay.

On the 26th of December, 1854, Wheeler, by deed of that date, conveyed the same property, covered by the deed to Tschiffely, to O. M. Linthicum, to secure a debt due by Wheeler to Edward M. Linthicum & Co. of three thousand eight hundred and eighty-three dollars and twenty-seven cents. This deed was recorded first, and had priority over the Tschiffely deed. Under this deed the property was sold, and produced only sufficient to pay the Linthicum debt, and leave a surplus of $91.

In the meanwhile, Wheeler had paid, in three different payments to Mrs. Fowler, the gross sum of $800 and interest, to about the 12th of June, 1857, leaving $1,200 principal due at that date. Mrs. Fowler had intermarried with Plaintiff, Turton, and on the 18th of November, 1857, Wheeler confessed a judgment in the Circuit Court of the District of Columbia in favor of Turton for the sum remaining due, with interest, from the 12th of July, 1857.

Turton then demanded payment of the debt from Dufief, and on his refusal brought this action.

I. The first objection in this Court is, that it has no jurisdiction. The declaration sets up a debt of $2,000, but the proof, the bill of particulars as it may be called, shows that this sum was subject to certain credits, which reduce it to $1,200, with interest, from 12th July, 1857. This sum, with interest added to 10th November, 1860, the day of the judgment in the Circuit Court, is not sufficient to give this Court jurisdiction.

Debt.....	$1,200
Interest 12th July, '57 to Nov., '60.....	240
	$1,440

II. On this state of the case the Plaintiff asked the Court to instruct the jury as set out on p. 25 of the record. This instruction was refused, and rightly, because—

1. There is no evidence from which the jury can infer that the Defendant, on any consideration of advantage to himself or injury to others, undertook as is suggested in the first branch of the prayer; or
2. That the failure to record the deed to Tschiffely was the act of the Defendant; nor is their any evidence to connect him with that act.
3. The instruction is based on a partial statement of facts, which are met by other parts of the proof in the cause.

III. The instruction given by the Court (pp. 26, 27,) is based on the essential facts of the case, which are stated hypothetically with perfect fairness to each party, and the law on those facts is correctly stated.

No authority is needed to support the statement of the law on the facts collated by the Court.

JOS. H. BRADLEY,
For Defendant in Error.

IN THE

Supreme Court of the United States.

TURTON vs. DUFIEF.

BRIEF OF PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

TURTON vs. DUFIEF.

BRIEF OF PLAINTIFF IN ERROR.

FIRST POINT.

This Court has jurisdiction of this Writ of Error.

The amended narr sets forth in each count an indebtedness of $2,000, and claims $3,000 damages.

Record, 5.

Upon an examination of the counts, it will be seen that interest on the amount of the note set forth, computed to the day of suit, would be due for over seven years, thus showing, from the averments *in narr*, that the debt and damages claimed exceeds $2,000. All that this Court can look at, when the Plaintiff below is Plaintiff in Error, is the amount claimed in his demand.

Sewall vs. Chamberlain, 5 How., 6.

Lee vs. Watson, 1 Wallace 337

In Bennett vs. Butterworth, 8 How., 129, this Court says—"For the *averment* of value, when he sues for property, shows the value of the thing in controversy, *as much as the averment* of debt or damage, when he sues for money."

But it is supposed this Court will look into the evidence before the Jury, to ascertain the real balance due to the Plaintiff; and that, acting on this principle, they will assume the correctness of credits endorsed on the note produced in evidence. These credits on the note amount to $800, in three payments, made in January and March, 1853, but the note bears interest from its date, (12th July, 1851,) and the standard is the amount claimed and in dispute at the date of the judgment, and not of suit.

Bank U. States vs. Daniel, 12 Peters, 52.

Interest being computed on the balance due, after allowing the credits, down to the day of trial, (10th Nov., 1860—Record, p. 27,) gives us a balance of over $2,000 due on that day, as will be seen by a brief calculation, viz:

Debt	$2,000	00
Interest from 12th July, 1851, to 12th January, 1853, where, by average of the time of the two first payments, $300 was paid, is 1 year and six months	180	00
	$2,180	00
Credit—12th January, 1853	300	00
	$1,880	00
Interest on balance to 5th March, 1853, 1 month and 20 days	15	66
	$1,895	66
Then paid	500	00
	$1,395	66
Interest to 5th Nov'r, 1860, 7 years and 8 months	641	93
Balance due at judgment	$2,037	59

But we might have satisfied the Jury, if allowed to try the case under proper instructions, that these credits ought to be disregarded, as they were open to explanation, and, in fact, were disallowed in a judgment obtained in Washington City on that note.

Record, p. 17.

It is therefore manifest, that upon the face of the note and credits endorsed, the matter in controversy was over $2,000, and this Court has jurisdiction.

But the Defendant in Error will further claim, that on the trial he produced and proved, on cross-examination of the witness Wheeler, receipts for other credits, which would further materially reduce our claim.

See Record, 23.

But this argument assumes, as matter of law, the credibility of the witness proving those credits, and whom the Jury might have discredited.

The receipts themselves might have been shown to be forgeries, and therefore this Court cannot assume their *genuineness* any more than in the case of the deed offered in evidence in the case of

Deery vs. Cray, Dec'r T., 1866.

SECOND POINT.

On the merits we contend that the Court erred in its instruction to the Jury, and deprived the Plaintiff in Error of the benefit of relying on the evidence *adduced* in the trial.

The Plaintiff proved that the Defendant, Dufief, received $2,000 from Mrs. M. A. Fowler, before her intermarriage with Plaintiff, and which he undertook to invest for her, knowing it was in her hands as guardian of her three children.

Record, 9.

This investment was made by Dufief in his own name, on 12th July, 1851, at 12 months, by lending it to E. Wheeler on his promissory note, secured by a deed of trust on real estate, as appears by the note and deed of trust.

Record, 9, 10, 11, 12.

This deed was withheld from record until 8*th March*, 1856, a period of nearly five years, and the property conveyed was worth $4,000.

Record, p. 12.

The whole of this security was lost by the neglect to record the deed of trust, for a long period, during which Wheeler placed other liens on the property, under which it was swept away and totally lost as a security to Mrs. Turton, who, by lending her children's money, had committed a devastavit under the laws of Maryland, as will be hereafter shown, and thus made the debt her own.

Record, 12, 16.

The Defendant, by an endorsement made on the note of Wheeler, on the day of its date, represents himself as transferring it on that day to her; and there is testimony tending to show that he gave the note and unrecorded deed of trust to Mrs. Fowler, (now Turton,) and that Wheeler, the maker of the note, made various payments to Mrs. Fowler and Turton, the present Plaintiff, on the debt.

See Bradley's evidence, p. 21.
" Wheeler's " p. 24.
" " " p. 23.

And Mr. Bradley, on cross-examination by the Defendant, thinks that he obtained the judgment in Washington, as attorney of the Plaintiff, on this note, against Wheeler.

See the judgment in Record, p. 17, 19.

But there is, on these points, much contradictory testimony, chiefly under the hand of the Defendant.

Mr. Bradley admits that in 1856 Turton charged Dufief with neglecting to record the deed of trust.

Record, p. 22.

Dufief wrote to Plaintiff on 20th March, 1856, that he had, "at his (Turton's) request, placed the papers in the trustee's hands," and encloses the advertisement of the property under the deed of trust, and adds "*I am sorry this has been the result of my desire to oblige* Wheeler." This is certainly very strong evidence to establish his agency in withholding the deed from record and indulging Wheeler, towards whom he had very intimate and delicate relations, and every motive to befriend, as shown in Wheeler's testimony.

Record, 16.

But his second letter, without date, to the Plaintiff, and found in Record, p. 20, tells us volumes.

It begins by showing how much he had been "worried" by this "unpleasant piece of business," and then proceeds to state that he had got an order of Court, as will be seen by Mr. Bradley's letter. (See it, dated 10th June, 1856, but it contains no reference to any action of the Court but the decree in Linthicum's favor.)

Record, p. 22.

The letter then states that the Defendant "proposed that Wheeler should give him (Dufief) a judgment for the amount of the balance, and, in order to enable him to start, proposed a stay of execution for two years from the recording of the judgment, and he agreed; and they went up to Mr. Bradley and had such a one drawn up by Mr. Bradley and signed by himself," (Wheeler.) This is the power to confess judgment in favor of Turton, dated 11th June, 1856.

Record, p. 19.

The dateless letter of Dufief is thus shown to be written after the 11th June, 1856, and shows conclusively that it was his *own act* in taking that judgment and giving a stay for two years from the *recording* of the judgment. By an unaccountable delay, which Mr. Bradley says he can't explain, the judgment was not recorded until 18*th Nov'r*, 1857, (18 months after the warrant to confess,) and then with a stay of two years, thus indulging Wheeler three years and six months, instead of *two years*.

Record, 19.

Dufief

~~The letter~~ then misleads Turton into the belief that the judgment against Wheeler was taken in his own name, and thus assured the debt to Turton, and expresses the belief that Wheeler will pay every dollar, and "his regret at what had occurred," as he (Dufief) "acted the voluntary part of a friend, and from the purest motives;" and concludes with the moral reflection—"How often it happens, when we act from the best and most sincere motives, we fail to accomplish our object."

Record, 21.

In the face of this letter, and the manifest inferences from it, we had a right to argue that this whole *debt was lost* by the twofold indulgence shown by Dufief to Wheeler, in not recording the ample security of the deed of trust, as well as in not recording the judgment; but more especially had we the legal right to argue that by his own *intermeddling*, and the non-recording of the judgment until 18th November, 1859, *less than* three years before our suit, Dufief had on that day converted this claim to his own use, if he had not done so before; and that on that day he acknowledged the debt as *unpaid*, and assumed liability therefor to Turton, especially in view of his express declaration "that Wheeler had given the judgment to him," (Dufief.)

Turton was thus misled by the Defendant into the belief that he had assumed the claim and merged it in a judgment in his own name against Wheeler, and there is no evidence to show that Turton ever knew that the judgment was in his name.

As the note was filed in that record, it is competent for us to infer that the note had been re-transferred to Dufief, (if in fact it had been ever delivered to Mrs. Fowler,) that he might assume the debt and proceed in his own name against Wheeler.

ief

We conclude—

1st. That the Plaintiff's first prayer ought to have been granted, as sanctioned by the leading case of

Coggs vs. Barnard, 2 Ld. Raym., 913.
3 Petersdorff's Abr., 364.
Foster vs. Essex Bank, 7 Mass., 479.
1 Md. Rep., 340.
1 Parson's Contr., 73–4.
8 B. Monroe, 415.
Hill on Trustees, 527–539, top page.
Story on Bailments secs 171 a – 173.

2d. That the Court's instruction was erroneous—

1. Because it wholly acquits the Defendant from liability, if the Jury find that he delivered the note and deed of trust to Mrs. Fowler before maturity of the note, and that Wheeler was then solvent and the security ample.

This cut us off from all claim to hold Dufief responsible, if the deed and note were re-delivered to him as bailee, to be collected at any time before the *4th May*, 1855, when the deed to Linthicum was recorded.

Record, 12.

2. Because it ignores the material fact that the Defendant had represented himself as assuming the debt of Dufief, and had undertaken, by docketting the judgment on the 18th November, 1857, to indulge him without any authority from the Plaintiff, and thus misled the Plaintiff.

3. Because it ignores Defendant's liability as endorser of the note, he not stating it was without recourse.

3 Kent's Com., 88.
12 Wheat., 214, 341.
Story on Prom. Notes, 145.

The whole evidence shows a waiver of *protest* by this endorser, and he is properly chargeable on the money counts.

3 Salk, 68.
1 Strange, 479.

[illegible]